No. 514.

IN THE

Supreme Court of the United States

October Term, 1944.

THOMAS HENRY ROBINSON, JR., - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

BRIEF FOR PETITIONER ON THE QUESTIONS AND POINTS FOR WHICH WRIT OF CERTIORARI WAS GRANTED.

THOMAS HENRY ROBINSON, JR., *Pro Se*,
Petitioner.

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SUBJECT INDEX.

STATUTES INVOLVED.

ALPHABETICAL LIST OF CASES.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

On January 15, 1945, this Court granted certiorari limited to the question presented under Point No. 1 of the petition for rehearing and under Question 5 (d) of the petition for certiorari. Point No. 1 of the petition for rehearing is that: "Injuries Inflicted Must be Permanent and be in Evidence at Time Court Imposes Sentence, Else the Death Penalty May Not be Inflicted." Question 5 (d) of the Petition for Writ of Certiorari is: "Whether the

death penalty was intended to be inflicted regardless of the time when inflicted or the degree of injury inflicted.

Petitioner relies upon the facts as summarized in the petition for writ of certiorari. Additional facts will not be restated in this brief except to the extent considered necessary to the argument of the questions and points presented.

ARGUMENT.

Construction of the Statute. Injuries Must Be Permanent and be in Evidence at Time of Imposition of Sentence, Else Death Penalty May Not Be Imposed.

It becomes the province of this Court, in this case, to construe certain phases of the Act of June 22, 1932, Chapter 271, Section 1; 47 Stat. 326, as amended May 18, 1934, c. 301, 48 Stat. 781 (Title 18, Sec. 408a, U. S. C. A.), which is an Act, as amended, known popularly as the "Lindbergh Act."

In construing certain language contained in that Act, resort may be had to the history of the legislation.

The original Act, passed in June, 1932, provided a maximum penalty, upon conviction, of life imprisonment.

The amendment containing the proviso restricting the imposition of the death penalty was Senate Bill No. 2252, 73d Congress, 2d Session. Its legislative history is contained in Volume 78, Part 12, of the Congressional Record. For ready reference the following legislative steps were taken:

S. 2252 reported out of the Committee on Judiciary, pp. 409-458;
Reported back, p. 5082, with Senate Report 534;

Passed the Senate, p. 5757;
Referred to the House Committee on Judiciary, p. 2233;
Reported with amendment, p. 8044;
Amended and passed the House, p. 8127;
Senate disagrees to House amendment and asks for conference, pp. 8263-8264;
Conferees appointed, pp. 8264 and 8322;
House insists on its amendment and asks for conference, p. 8322;
Conference Report submitted in the House, p. 8775;
Agreed to, pages 8855 to 8857;
Examined and filed, pp. 9006 and 9066;
Presented to the President, p. 9071;
Approved, p. 9146.

The Congressional Record discloses that Senators Copeland, Vandenburg and Murphy introduced, simultaneously, Senate Bills Nos. 2246 to 2258, which, among other things, proposed to: Make it a federal offense to flee the State in certain cases; to deny appeals in *habeas corpus* cases; to furnish notice at time of arraignment of intention to use an alibi; authorize consolidation of Governmental agencies such as the Treasury, the Post-office and the Department of Justice; and the last and key bill, regarded so by the Justice Department, was one to regulate commerce in small firearms.

Senate Bill No. 2252, one of the group of 13 bills introduced together, proposed an amendment to the original Lindbergh Act to the effect that an absence of three (3) days of the person seized created a presumption of interstate transportation, subject to being rebutted. Significantly enough, the Senate Bill made no provision for the imposition of the death penalty. See Senate Report No. 534, 73d Congress, 2d Session, March 22, 1934.

This Senate Bill was subsequently referred to the House for its action thereon; then to the House Committee on Judiciary. The House refused to pass the Senate Bill as passed, and instead proposed some amendments thereto, following which the Senate refused to pass it with the House-proposed amendments and the bill was then referred to conference. The House insisted on its amendments. Following conference on the bill, it passed both Houses, and when so passed included the House-proposed amendments.

The report of the Judiciary Committee of the House of Representatives, No. 1457, to accompany this Senate Bill No. 2252, discloses three House-proposed amendments to the Senate Bill. First, to include the words "or otherwise, except in the case of a minor, by a parent thereof." Secondly, to add a provision to the effect that the failure to release the kidnaped person within 7 days should create a presumption that the person had been transported in interstate or foreign commerce.

As to the third amendment, the one in question, the following is taken from the Judiciary Committee Report:

> "The third addition to this act is to permit the jury to designate a death penalty for the kidnaper. However, this penalty is not to be imposed by the court if the kidnaped person has been liberated unharmed PRIOR TO THE IMPOSITION BY THE COURT OF THE SENTENCE."

That proposed amendment was subsequently enacted as a component proviso of the statute, and reads as follows:

> "provided that the sentence of death shall not be imposed by the court if, *prior to its imposition,* the kidnaped person has been released unharmed."

There were no hearings on the amendments. Therefore, the report of the House Judiciary Committee on the third amendment, which is in question, constitutes about all there is in the way of legislative history concerning this particular amendment and proviso.

It is very clear that Congress intended that the death penalty should be withheld if PRIOR TO THE IMPOSITION BY THE COURT OF THE SENTENCE the kidnaped person has been liberated unharmed.

It is beyond the peradventure of doubt that Congress intended to offer to the kidnaper an inducement, in the form of a withheld death sentence, if the kidnaper would but refrain from action leading to *permanent* injury, permanent captivity, or death of the victim. The District Court, in the Parker case (19 F. Supp. 450) makes it clear that Congress so intended, and that Congress, by such inducement, preferred a *cured and live* victim to a dead or permanently injured one. The congressional preference, therefore, is for a *cured* and *live* victim as opposed to a *dead* or *permanently injured* one. Of that there can be no dispute.

The Circuit Court of Appeals' opinion in this same Parker case (103 F. 2d 857) which interprets the lower court's opinion as meaning that the physical condition of the victim at the time of release from captivity governs, even though the kidnaper must postpone the release until the cure is effected, is not only in conflict with the lower court's opinion with which it purports to agree, but likewise does violence to firmly established and well defined rules of statutory construction, and furthermore is entirely out of harmony with, and entirely overlooks, the evident purpose of Congress in making an inducement and withholding the death penalty.

It cannot be denied that one of the primary purposes underlying the congressional inducement held out to the kidnaper was to effect the return of the victim as speedily as possible so as to relieve the anxiety and mental strain of not only the victim but of the family of the victim. If the physical condition of the victim at the moment of release, instead of at the time of imposition by the court of the sentence, should be declared as determinative of whether the death penalty should, or should not, be imposed the kidnaper who may have injured his victim, and who had already collected the ransom demanded, and who would otherwise have no further purpose to serve by a continued detention of the kidnaped person, would then be put to the anomalous and even unwilling, if not burdensome, necessity of further detaining his victim so that a cure might be effected; thus would the kidnaper not only prolong the anxiety of his victim but at the same time increase and prolong the suspense and anxiousness of the victim's family, and also make it necessary for the investigating and law enforcement authorities to unnecessarily and at great cost continue in their search for the kidnaped person; for, if the cure and the death penalty are to be made to depend upon the condition of the victim at the moment of release, the kidnaper would undoubtedly, out of a sense of self-preservation, postpone the time of deliverance of his victim until the cure should be effected. For the kidnaper to do otherwise would be for him to violate the first law of nature—self preservation. It is the subject of judicial knowledge that a person will not willingly do any act resulting in his destruction. In desperation, if the cure should be slow, the kidnaper might even take the life of the victim rather than wait an unreasonable time for the cure to materialize.

In some cases, depending upon the severity of the injury inflicted, the release might have to be postponed for weeks or for an unusual length of time—all to the agonizing solicitousness of the victim's family, to say nothing of the discomfort and the anxiety to which the victim himself might continue to be subjected during such forced postponed confinement. That would be the exact antithesis to what was intended by Congress, and the results obtained by such a construction would be the very opposite to what Congress intended should be attained. Congress intended to alleviate the suspense and anxiety not only of the victim but of the victim's family and the law-enforcement authorities in the shortest time possible. It thus held out to the kidnaper a negative inducement and withheld the infliction of the death penalty if at the time of sentence by the Court the cure should then have been effected. To ascribe to Congress a contrary intention is but to champion an anomalous viewpoint on the subject and to thwart the real purpose underlying the Congressional inducement. Any portion of the opinions in the Parker case to the contrary should therefore be overruled as erroneous and as not carrying into effect the intention of the Congress which enacted the amendment.

From what has already been stated, it is apparent that in order for the death penalty to be applicable in *this* case it was encumbent upon the Government to first allege and prove beyond reasonable doubt not only the infliction of injuries, but the permanency thereof and that they were in existence at the time of imposition by the court of the sentence. The indictment in this case wholly fails to allege permanency of injuries, and there is a complete absence of any testimony upon the condition of the victim at the time the court imposed sentence. The victim appeared in

Court as the Government's chief prosecuting witness at the trial of petitioner, held, incidentally, over nine (9) years subsequent to the time of the alleged kidnaping. Not one single word flowed from her lips at the trial, or from the lips of any other witness, to indicate that she was then suffering in any manner or degree from the effects of the alleged kidnaping (T. R. 518 to 589). The presumption overwhelmingly prevails that she was cured. It devolved upon the Government to establish otherwise, which it wholly failed to do. An indictment must charge each element of an offense, *and every allegation must be proven beyond a reasonable doubt. There was a failure of allegation and proof in this case. Evans* v. *United States,* 153 U. S. 584.

One of the means of construing the intention of Congress is to construe the language and words used, keeping in mind that penal statutes are always to be strictly construed. One of the cardinal rules of construction of legislative enactment is that all of the words used in an act are to be given force and meaning. It cannot be assumed that any of the words used in an Act or proviso were used without some meaning, or that they were used superfluously, or that certain words could just as well have been omitted from an Act or proviso without destroying the legislative intent.

In the instant case, therefore, when the Judiciary Committee Report states that the death penalty is not to be imposed by the Court "IF THE KIDNAPED PERSON HAS BEEN LIBERATED UNHARMED PRIOR TO THE IMPOSITION BY THE COURT OF THE SENTENCE," it is exceedingly clear that it was the intention to withhold the imposition of the death sentence if, at the time of sentence by the court, the kidnaped person is *cured and alive,*

as distinguished from being *dead* or *permanently injured.* Whether to impose or withhold the imposition of the death sentence is made to depend upon the **PROVEN** condition (the allegations of the indictment permitting) of the kidnaped person at the time of trial and the imposition by the Court of the sentence. Had such not been the intention, the Judiciary Committee Report would not have contained the foregoing words, for Congress is not given either to wasting words or to using them without significant meaning. In a proviso, which, under certain circumstances, allows of the imposition of the death penalty, it is all the more to be supposed that every word is of major significance. It is clear that the framers of the proviso intentionally used the phrase "prior to the imposition by the court of the sentence" as relating to and defining the time governing the condition of the kidnaped person.

If it had been the intention of Congress to make the imposition of the death sentence to depend upon the physical condition of the kidnaped person at the very moment of release, instead of at the time of sentence by the court, Congress in no event would have resorted to the use of the many superfluous words which not only belie that intention but which themselves most persuasively indicate a clear intention that the proven condition of the kidnaped person at the time of trial shall control whether or not the death penalty shall be imposed.

It should be remembered that the proviso is, above all, and of itself, a limitation and restriction on the imposition of the death penalty and doubt as to its meaning should be resolved in favor of restricting the imposition of the death penalty in all cases where a doubt arises.

If it had not been the intention to have the time the court imposes sentence control the imposition or withhold-

ing of the imposition of the death sentence, the use of the words in the proviso and in the Judiciary Committee Report was quite superfluous, and in all probability the proviso would have been stripped down to a bare necessity of words and most likely would have read simply:

> "provided that the sentence of death shall not be imposed if the kidnaped person has been liberated unharmed."

But, when the words "liberated unharmed" in the present proviso are preceded by the words: "provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been" (liberated unharmed), it is indisputably clear that Congress purposely made the time of imposition by the Court of the sentence regulate and control the condition of the victim so as to determine then whether the death penalty should, or should not, be imposed.

Indeed, the rules of statutory construction so dictate. It is a rule of statutory construction that qualifying words cannot be rejected. The imposition by the court of the sentence qualify the words "liberated unharmed" so as to make the liberation unharmed inter-dependent upon the action of the court in imposing sentence. Manifestly, the phrase "liberated unharmed" refers to the court's imposition of sentence. The qualifying words can not be rejected. They have a definite, dominating place and meaning in the proviso which control the phrase "liberated unharmed."

There is another rule of statutory construction to the effect that, when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. By

reading the clause "has been liberated unharmed" as applicable to all of the words of the proviso which precede that clause, it becomes very clear that the clause is so controlled in its meaning as to make it definitely clear that the death penalty may not be imposed if at the time of the imposition by the Court of the sentence the kidnaped person is cured and alive, and not either dead or permanently injured.

In support of the above rules of construction, the case of *United States* v. *Standard Brewery,* 251 U. S. 210, 40 S. Ct. 139, is of great assistance. That case had for construction the Prohibition Statute which made it unlawful to manufacture or to sell for beverage purposes any beer, wine, "or other intoxicating malt or vinous liquor." The opinion had this to say:

> "It is elementary that all of the words used in a legislative act are to be given force and meaning, Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. Ed. 782; and of course the qualifying words 'other intoxicating' in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words * * *. So here, we think it clear that the framers of the statute intentionally used the phrase 'other intoxicating' as relating to and defining the immediately preceding designation of beer and wine."

This was said in the case of Porto Rico Railway Light and Power Company v. Mor, 253 U. S. 345, 40 S. Ct. 516:

> "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. United States v. Standard Brewery, 251 U. S. 210, 218, 40 S. Ct. 139; Johnson v. Southern Pacific Co., 196 U. S. 1, 18-19, 25 S. Ct. 158, 49 L. Ed. 363, and cases cited."

It will be particularly noted that the proviso *restricts* the imposition of the death penalty by the court if "PRIOR TO ITS IMPOSITION" the kidnaped person has been liberated unharmed. In Commonwealth *ex rel.* Adams v. Stephens, 345 Pennsylvania, 28 Atlantic 2d 924, the Court was called upon to determine what was intended by the use of the words "four years prior to his election," in a case involving residence qualification of an office holder. This was said:

> "We are called upon to determine what the legislature meant by the words 'four years prior to his election.' It is contended upon the part of the respondent that we can go back any number of years in order to make up the four year requirement * * *. We are of the opinion that when the legislature provided that the prospective officeholder shall have been 'an elector of the borough for at least four years prior to his election' it meant immediately prior to his election."

In the instant case, a reasonable interpretation of the words "prior to its imposition," consonant with the intent of Congress, and considering this to be a restrictive proviso, would be that it was the intention to withhold the imposition of the death penalty if it be shown that at the time of trial the kidnaped person is cured and alive. This is but another approach to a solution to the problem at hand, and although it is from a different angle, yet it is

at the same time a plausible one, and one that presents an acceptable answer to the question at hand.

After a consideration of the question as herein presented, the conclusion is inescapable that the death penalty which was imposed upon petitioner was illegal.

Question of Permanent Injury.

It is the contention of petitioner that the death penalty may not be imposed unless it be first alleged in the indictment and proven beyond a reasonable doubt that the injuries which were said to have been inflicted were permanent. It was alleged in the indictment that the kidnaping took place in October, 1934 (R. 14). It was nowhere alleged that the injuries alleged to have been inflicted were permanent or of a permanent nature. It is axiomatic that nothing which is not alleged can be proven. The trial of petitioner commenced November 29, 1943 (R. 171), following a period of over seven (7) years of incarceration of petitioner in various Federal prisons, the last of which was Alcatraz, upon what turned out to be an illegally imposed sentence. It was not established upon the trial that any of the injuries which were said to have been inflicted upon the victim were permanent or of a permanent nature. The record is stony silent as to that.

It has been fully demonstrated by the opinion of the District Court in the Parker case (19 F. Supp. 450) that Congress preferred a live and cured victim to a dead or permanently injured one. It thus devolved upon the Government to establish that the victim involved in this case was permanently injured. As heretofore stated, she appeared at the trial as the chief prosecuting witness and neither she nor any other witness established that the

injuries which she claimed to have sustained were permanent or were in existence at the time of trial. It is not enough to establish receipt of injury. Before the death penalty may be imposed it must be established that the injuries inflicted were and are permanent and in existence at the time the court imposes sentence. IN THE INSTANT CASE THERE WAS A COMPLETE ABSENCE OF ANY TESTIMONY TENDING TO ESTABLISH THAT EVEN AT THE TIME OF RELEASE THE INJURIES CLAIMED TO BE IN EXISTENCE HAD BEEN PREVIOUSLY INFLICTED BY PETITIONER. THE RECORD ON THAT ISSUE IS STONY SILENT. THE GOVERNMENT WHOLLY FAILED TO ESTABLISH AN ESSENTIAL ELEMENT OF THE CRIME ALLEGED (R. 545).

In the Parker case, heretofore referred to, it was necessary, for venue purposes, to determine whether the offense charged in the indictment was such as enabled the death penalty to be inflicted. It was held that while the indictment charged beating and torture of Wendell, the victim, it did not aver any continuing or permanent injury to him. It was held also that the case was not one where the death penalty could be imposed, despite the allegation in the indictment of inflicted injuries and the establishment of such injuries by ample proof, hence the motion for change of venue was overruled. The record and the testimony of that case are contained in the records of the Supreme Court of the United States inasmuch as Parker petitioned for a writ of certiorari, but which was denied (59 S. Ct. 1044; 307 U. S. 642). A reading of the testimony of Wendell in that case discloses that the kidnapers handcuffed and roped him, hit him about the body, ran electric light globe over his face, hit him in his "privates," held a lighted ci-

garette to his eyes, kicked him in his testicles, refused to let him go to the bath room, "spread-eagled" him on the floor; threatened to put him in a barrel of concrete and dump him into the ocean and to tear off his legs and "knock off" his whole family; that while imprisoned he had acute appendicitis, but was not allowed to be operated on, and that he had pneumonia; that his face was burned and that he had marks on his body, blood stains on his clothes; that his feet were tied, and that he was strapped, and in general that he was exceedingly roughly handled and treated. Nevertheless, such injuries, absent proof, were not held to be permanent.

As that record is a record of this Court, and involves a related question, this Court may take judicial notice of that record and of the testimony in that case.

This Court, in as late a case as *United States* v. *Pink*, 315 U. S. 203, 62 S. Ct. 552, had this to say:

> "And there is no reason why we cannot take judicial notice of the record in this Court of the Moscow case. Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 217, 22 S. Ct. 820, 822, 46 L. Ed. 1132; Dimmick v. Tompkins, 194 U. S. 540, 548, 24 S. Ct. 780, 781, 48 L. Ed. 1110; Freshman v. Atkins, 269 U. S. 121, 124, 46 S. Ct. 41, 42, 70 L. Ed. 193."

It is the earnest contention of petitioner that regardless of the nature of the injuries inflicted upon the kidnaped victim, it is an indispensable prerequisite to the imposition of the death penalty that not only must it be alleged in the indictment that the injuries were permanent, but that there must be such an abundance of proof as is required to establish that fact beyond a reasonable doubt. In this case the Government wholly failed to allege or prove the permanency of the injuries claimed to have been inflicted upon

the victim. Such failure is but the establishment of another reason why the death penalty imposed upon this petitioner was illegal and calls for a reversal of this case.

CONCLUSION.

This Court is earnestly implored to give to this case the earnest and serious consideration it so rightfully deserves, and to grant to petitioner the relief prayed for in his petition for writ of certiorari, heretofore filed.

In conclusion, petitioner desires to state that in 1936 he was given what turned out to be an illegal life sentence. After serving over seven years in prison upon that sentence, over six of which were served in Alcatraz Prison, and after having won the right to a legal trial, petitioner was unfortunate in having had imposed upon him the extreme penalty, and what he vigorously and earnestly contends was an illegal sentence. Since December 13, 1943, this petitioner has suffered indescribable mental tortures. In all, he has been confined for as many years as are served ordinarily by persons convicted of murder, considering that such persons are usually paroled in from eight to ten years after confinement. Petitioner has not taken a life, yet his life has been exacted in the administration of an Act which is fraught with uncertainty as to its meaning and scope. Any doubt that exists concerning the applicability of that Act to the facts of this case, petitioner asks this Honorable Court to resolve in his favor and to declare the sentence of death previously meted out to him to be illegal.

Respectfully submitted,

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